

Ethical Issues That Arise During Trial



Utah Bar Journal

November /December
2013



Attorney Discipline

Utah Bar Journal
November/December
2013

Attorney Discipline

UTAH STATE BAR ASSOCIATION MEMBERS
and the Utah State Bar at 1000 West 1000 South, Suite 1000, Salt Lake City, UT 84119, are the Utah State Bar Association. The Utah State Bar Association is a non-profit organization that is dedicated to the highest standards of the legal profession. The Utah State Bar Association is a member of the American Bar Association and the National Conference of Bar Associations.

ATTORNEY DISCIPLINE
On Jan. 1, 2013, the Utah State Bar Association (USBA) adopted the new Rules of Professional Conduct (RPC) for the Utah State Bar Association. The RPC are the same as the RPC of the American Bar Association (ABA) and the National Conference of Bar Associations (NCBA).

DISCIPLINARY
The USBA has established a disciplinary committee to handle the discipline of attorneys who are members of the Utah State Bar Association. The committee is composed of judges and attorneys who are experienced in the field of attorney discipline.

DISCIPLINARY
The USBA has established a disciplinary committee to handle the discipline of attorneys who are members of the Utah State Bar Association. The committee is composed of judges and attorneys who are experienced in the field of attorney discipline.

DISCIPLINARY
The USBA has established a disciplinary committee to handle the discipline of attorneys who are members of the Utah State Bar Association. The committee is composed of judges and attorneys who are experienced in the field of attorney discipline.

SCOTT DANIELS

Former Judge • Past President, Utah State Bar
Members, Supreme Court Advisory Committee on Professionalism
Assesses the availability to defend lawyers accused of violations of the
Rules of Professional Conduct, and judges accused of violations of the
Code of Judicial Conduct.

Utah Office: 360-521-1234, Utah Office: 360-521-1234, Utah Office: 360-521-1234, Utah Office: 360-521-1234

UTAH BAR JOURNAL

What shall it profit a prosecutor if s/he shall gain a wrongful conviction and lose his license and/or his reputation?

What conduct will cause you to lose your bar license?

You're a lousy lawyer?

You can't make any money?

You lose lots of cases?

Former Texas Prosecutor Sentenced to Jail

- The only thing for which you will have your bar license taken away is unethical behavior.

The man who was the face of the law for 30 years is charged over a wrongful murder conviction.

The Associated Press, GRIERSTOWN, Texas

— A former Texas prosecutor charged over a wrongful murder conviction agreed to a 10-day jail sentence Friday, accepting the punishment in front of the innocent man he helped put in prison for nearly 25 years.



What do Jerry Springer,
Dane Nolan
and
Angela Micklos
have in common?

Victim of a sexual assault case told a different story to the producers of the Jerry Springer Show at their behest than what she had told the police. But she explained it by saying she had been coerced into changing her story.

What do you do?

What would you advise and why?

Don't want to convict the wrong guy.

You always want to do it correctly.

It's going to come out sooner or later.

Own it!

We all really do want justice.

And that means fairness to all
including the defendant.

But, we and the defense play by different
rules.



- ❑ We are competitive people and we want to win. We are expected to dot every i and cross every t.
- ❑ But the defense is **NOT**.
- ❑ We never hear of defense counsel's misconduct, but we always hear of prosecutorial misconduct.
- ❑ We only hear about problems with defense counsel when they didn't do a good enough job to win-i.e. ineffective assistance counsel.

Utah Appellate Blog

State v. Campos – Prosecutorial Misconduct and “Cumulative” Ineffective Assistance

• By Beth E. Kennedy on September 9th, 2013 Posted in [Commentary on Utah Law](#), [Utah Court of Appeals Opinions](#) The Utah Court of Appeals recently issued *State v. Campos*, 2013 UT App 213, which reversed Reginald Campos's conviction for attempted murder. Mr. Campos achieved this result by successfully showing that his trial counsel was constitutionally ineffective. Notably, the court's opinion did not rely upon any *single* error made by counsel, but instead on the “cumulative effect” of those errors. This opinion also holds that it is prosecutorial misconduct for a prosecutor to tell the jury in closing argument that defense counsel's theory of the case is a “red herring.” *Id.* ¶¶ 55, 57.

• **I. The Facts**

• Mr. Serbeck believed that the car he saw driving through his neighborhood was associated with some recent crimes in the neighborhood, so he and his neighbor followed the car in Mr. Serbeck's SUV. *Id.* ¶ 3. The driver of the car was actually Mr. Campos's sixteen-year-old daughter. *Id.* ¶ 5. When she got home, she reported to her father that she had been followed. *Id.* ¶¶ 5-7. Mr. Campos and his daughter then left to find the SUV that had followed her. *Id.* ¶ 7. When they found it, Mr. Campos U-turned abruptly in front of Mr. Serbeck's SUV, forcing him to stop quickly. *Id.* Mr. Campos and Mr. Serbeck disagree on the details of what happened next, but ultimately, Mr. Campos shot Mr. Serbeck, paralyzing him from the chest down. *Id.* ¶¶ 8-12. The jury convicted Mr. Campos of attempted murder with injury for shooting Mr. Serbeck, and aggravated assault for holding Mr. Serbeck's neighbor at gunpoint. *Id.* ¶ 7.

Why is that? Because on appeal, we(the State) are always playing defense. It's the losers who get to appeal and that's not us. [sic] So, we don't get to complain about something the defense attorney did wrong.

Rule 14-301
Preamble

9. Lawyers shall not hold out
13. Lawyers shall not knowingly file or serve moti

•Examples of problem situations.

You're in the restroom washing your hands when one of the jurors comes in and starts talking to you.

After a conviction, you become aware one of the jurors went to the scene of the crime during the trial. Or, did some research on an issue in the case.

You know one of the jurors and you're certain they probably can't be fair, despite what they have told the judge.

Two of your witnesses violate the exclusionary rule.

Generally, you're the only one that knows about it. What do you do when these things occur?

How do you prevent this type of thing from happening?

An adage:

An ounce of prevention is worth a pound of cure.
Tell them what will happen right up front in your opening statement.

A genius gets it the fifth time.

THE TEN COMMANDMENTS* OF ETHICAL BEHAVIOUR

*
Actually there are thirteen

1. Thou shalt not exercise improper
peremptory challenges.

Rule 8.4 Misconduct.

(d) Engage in conduct that is prejudicial to
the administration of justice.

Batson/Cantu challenges.

2. Thou shalt not engage in conduct involving
dishonesty, fraud, deceit or
misrepresentation.

Rule 8.4 (c).

Judge Ken Anderson

Michael Morton

3. Thou shalt not back out of a plea offer
that you made, but can't honor.....unless.

4. You believe a confession is questionable at best, and illegal, at worst. But a seasoned, competent defense attorney hasn't challenged it. Do you use it?

Why?
Prosecutorial misconduct
Ineffective assistance of counsel
Plain error.

5. As the trial has progressed, your case has gotten weaker and weaker. Do you pull the plug or let the case proceed?

Does the answer change if you are now convinced there isn't sufficient evidence to merit a reasonable likelihood of success at trial?

6. You are convinced right up front that there isn't probable cause or a reasonable likelihood of any conviction in the case. But your supervisor, or D.A. or C.A. disagrees and wants you to try the case. What do you do?

Rule 5.3 & 3.8. (Reasonable likelihood of success)

7. You have a weak, but winnable case. Are you required to inform the defense counsel of the weaknesses of your case?

8. Are you required to provide the defense with all of the evidence you have?

Holding some back for rebuttal?

Brady does not warrant the Court of Appeals' holding. It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably. ****846** There is no general constitutional right to discovery in a criminal case, and Brady did not create one; as the Court wrote recently, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded. . . ." *Wardius v. Oregon*, 412 U.S. 470, 474, 93 S.Ct. 2208, 2212, 37 L.Ed.2d 82 (1973). Brady is not implicated here where the only claim is that the State should ***560** have revealed that a government informer would present the eyewitness testimony of a particular agent against the defendant at trial. [8] In terms of the defendant's right to a fair trial, the situation is not changed materially by the ad- 97 S.Ct. 837 Page 10 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30

(T)he State has two independent obligations to provide evidence to the defense. First, the State has a duty under the Due Process Clause of the United States Constitution to provide, without request by the defendant, all exculpatory evidence. Second, when required by court order, the State must disclose evidence pursuant to Rule 16 of the Utah Rules of Criminal Procedure.

State v. Rugebregt, 965 P.2d 518, 522 (Utah Ct.App.1998) (internal quotation marks omitted)

9. A witness tells you a better story in the hall just before you put him on than what is in the police report. Do you use it?

A police report is for the purpose of refreshing recollection; it's not a transcription of all of the details.

10 Your victim in a domestic violence case tells you beforehand that she is going to say something different on the stand than what she had told the police the night of the crime. Do you put her on the stand solely for the purpose of impeaching her?

State v. Treseder 244 P. 654, 655 (1926) Can't call a witness solely for the purpose of impeaching her. Rule 607 URE Can impeach our own witness. Rule 801(d)(1)(A) Prior statement is not used just for the purpose of impeaching, but comes in as substantive evidence. Impeaching the witness is foundation for getting in the original statement.

CONCLUSION

The answer to the question is...

NOTHING
